

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JANUARY 8, 1993

Mr. Leo P. Duffy
Assistant Secretary for Environmental
Restoration and Waste Management
U.S. Department of Energy
Washington, D.C. 20585

Dear Mr. Duffy:

Thank you for your letter of November 20, 1992, conveying the Department of Energy's (DOE's) opinions regarding the impact of the recently-enacted Federal Facilities Compliance Act of 1992 (FFCA) on DOE's application for a case-by-case (CBC) extension of the land disposal restrictions effective date for Third Third mixed wastes. You stated in your letter that, although the FFCA delays the waiver of sovereign immunity for fines and penalties, it does not address other potential enforcement actions, including injunctive relief. As such, DOE disagrees with the conferees' statement in the Conference Report accompanying the Act that enactment of the FFCA "obviated the need for the Environmental Protection Agency (EPA) to pursue the CBC petition." (H.R. Rep. No. 886, 102d Cong., 2d Sess. 22 (1992)). In contrast, your position is that it is "imperative for EPA to proceed with its consideration of DOE's CBC extension request."

EPA certainly appreciates DOE's desire to remain in compliance with the land disposal restrictions storage prohibition under the Resource Conservation and Recovery Act (RCRA). Given the background surrounding passage of the FFCA, however, we believe that there is a substantial question as to whether proceeding with DOE's case-by-case petition is necessary or appropriate. First, the legislative history provides ample indication of Congress's intent that DOE be allowed additional time in which to assess its mixed waste treatment capacity requirements and to finalize a plan to develop the appropriate treatment capacity. This additional time would provide the cushion that DOE needs in lieu of that which would be otherwise afforded by the CBC extensions.

In addition, the tasks set forth under the FFCA will impose formidable resource requirements on EPA to review and, as appropriate, approve the information compiled by DOE. Likewise, we would expect that considerable DOE resources will be needed to complete the inventory of its mixed wastes and treatment capacity requirements and subsequently a waste management plan for each DOE facility managing mixed wastes. We question the prudence of expending both our agencies' limited resources on the continued but discretionary processing of DOE's CBC application in light of the statutory requirements, including tight time-frames, placed upon us by the FFCA. Furthermore, the

limited scope of any CBC extension (both as to its duration and the type of wastes covered) would provide only temporary relief, up to two years, for a project that is likely to take longer to resolve properly.

Aside from the resource issue, several key issues remain to be resolved, including those raised by commenters such as the Natural Resources Defense Council (NRDC), on the proposed Federal Register notice to grant the CBC extension. These issues may prove to be of sufficient weight that alternative approaches to the entire mixed waste treatment question end up providing more overall benefit to DOE and EPA. Another issue is raised by the Congressional conferees' conclusion regarding the adequacy of an interagency agreement in making an acceptable demonstration of a binding contractual commitment to provide treatment capacity. Again, alternative approaches using the FFCA may prove to be more attractive to both agencies.

EPA is also concerned that the commitments currently proposed as part of the CBC agreement could conflict with those arrived at under future facility-specific plans, as required by the FFCA. Congressional intent in the FFCA is that plans for addressing treatment and disposal of mixed waste be approved by the impacted states, rather than EPA, where those states have appropriate RCRA and LDR authority.

The interagency agreement for certain treatment capacity under consideration contains very long-term commitments as to deadlines for bringing various treatment technologies on line. If an agreement is entered into, those commitments would have to be meaningful and binding. For outside observers, it might call into question the seriousness of those commitments if at the same time, DOE is still developing a separate plan that would become binding through the process laid out in the FFCA. In light of the fact that the FFCA provides DOE the opportunity to more comprehensively inventory its wastes and provides additional time to develop plans by which to manage those wastes, EPA believes that it is more appropriate to make commitments to treatment plans within the framework of the FFCA.

We would be glad to meet with you to further discuss these matters. If such a meeting is desired, please have your staff contact Les Otte of my staff at (703) 308-8480.

Sincerely yours,

Don R. Clay
Assistant Administrator